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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 899

JOHN M. KEARNEY, *Petitioner,*

v.

THE UNITED STATES, *Respondent*

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

REES B. GILLESPIE,
Shoreham Building,
15th and H Streets, N. W.,
Washington 5, D. C.
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner's Reply Brief makes specific page references to Respondent's Brief in Opposition and, for the most part, such references are made in the order in which the contentions of Respondent appear in its brief.

Respondent's brief at p. 3, footnote (2) recites that Petitioner had 700 hours of flying time for the year preceding his release from active duty which occurred on October 15, 1946. We can offer no explanation as to the source of this information. Why it should appear in a report of a medical examination conducted on October 15, 1946 is unknown to us. This same examination is recited in part in Examiner Pons brief (Ex. 30, p. 5), yet no reference is made therein to this 700 hours of flying time.

As far as we know, it does not appear at any other place in the Hearing before the BCNR or in the record before the Court of Claims. Its appearance here is the first time Petitioner knew of it. Frankly, we don't see how it could be true. The year preceding his release from the Marine Corps would encompass the period from October 16, 1945, to October 17, 1946. Petitioner was in the hospital from June 13, 1945, being the date of the airplane crash, to April 15, 1946. He was on recuperative leave from April 15, 1946, to May 15, 1946. Thereafter, he was on active duty from May 15, 1946, to October 17, 1946, on which date his terminal leave expired. Thus, for the 5 month period, this gross flying time of 700 hours, would require him to fly 140 hours a month. It simply cannot be true. However, to qualify for flight pay when he was out of the hospital only required him to be in a plane with a pilot 4 hours a month. Petitioner testified before two Boards, under oath, that he did no solo flying after his plane crash on June 13, 1945.

Respondent's brief, beginning at the bottom of p. 5 and continuing, describes the evidence upon which BCNR based its decision, but the Respondent neglects to include therein the secret advisory opinion of Dr. Reitz and also fails to state that the "opinion" of Dr. Pugh was also a secret advisory opinion. Respondent then quotes the decision of BCNR as to the "injuries sustained" (top of p. 6) by Petitioner, which should be cited as (B, Ex. 4, p. 2, Par. 9b). Please compare such "injuries sustained" with Respondent's *own* Exhibit B3, being a report of a medical examination dated July 17, 1950, which was, in fact, the very examination "preceding his separation from the Air Force." It provides:

> "Dislocation wrist, right, fractured jaw, and *fractured skull.* Aircraft accident 1945 (USMC) 40% loss of motion, wrist, and *headache persist.* No other pertinent medical history." (Italics supplied)

Air Force did not see fit, as did the BCNR, to omit either the Petitioner's "fractured skull" or his "headaches" or attempt to minimize loss of motion of Petitioner's wrist.

Respondent's brief, in the last sentence commencing at the bottom of p. 8 and continuing on p. 9 to the end of the paragraph, is misleading. In the first place, Respondent earlier at p. 7 quite properly describes our position in the Court below as a "mistake" of Petitioner's former Counsel in not introducing the 35 exhibits and the "newly discovered evidence." Both of these are consistent with the provisions of Rule 54(b). However, it was not the secret advisory opinion itself of February 24, 1954 which was the "newly discovered evidence", but the fact that its author was Commander Harvey E. Reitz, Medical Corps, USN, who was the same person who had been, long prior to the above date of said opinion, disqualified from sitting on the BCNR at the Hearing on December 21, 1953. Respondent blandly describes this secret advisory opinion, coming to BCNR at the time it did, by this particularly objectionable author at "nothing more that a letter from the Bureau of Medicine and Surgery to the Correction Board, analyzing the medical evidence in the case." No reason is offered and none could exist, why Dr. Reitz and Dr. Pugh were not called to the witness stand and required to testify as did Dr. Fuchs. It is interesting to note that the BCNR and its Examiner Pons propounded 128 questions to Petitioner and Dr. Fuchs, 37 of them being propounded by Examiner Pons. In addition, BCNR obtained and considered 3 adverse medical advisory opinions from officer personnel of Navy, 2 of which were secret. Further, Examiner Pons filed a brief with BCNR of 24 pages. A casual examination of it will reveal definite and compelling evidence of strong opposition to Petitioner, yet Respondent here refers (p. 13) to the proceeding in BCNR as a "nonadversary proceeding." Respondent's brief in the middle of page 11 refers to an X-ray, "by the Air Force dated January 9, 1950.". First, we can find no

examination on such a date, but the citation to (A, Ex. 7, p. 53) gives the date of this examination as *June 9, 1950.* It was taken by Board Member Wilson from Examiner Pons brief. (A 30, p. 12) Petitioner's affidavit in support of his Motion for Rehearing below recites that such medical examination of June 9, 1950 was not in the medical records which he received from the Air Force. However, Petitioner's brief in support of his Motion below stated at page 32 as follows: "It is submitted that since Examiner Pons relied upon this examination and it purported to be against plaintiff, that the defendant should require BCNR to produce it." *It was ignored.* Again Respondent's brief at the top of p. 5 in speaking of the Physical Disability Appeal Board (Marine Corps) states that it, "*replied* [to BCNR] that—the proper reviewing agency, under applicable Navy directives, was the Naval Retiring Review Board (Marine Corps) (A, Ex. 4)". We can find no such "reply" in Ex. 4. This Ex. 4 brings to light that the directive of the Secretary of the Navy which permitted Boards to furnish "advisory opinions" in cases requested of them by the Correction Boards was dated "9 April 1953." (Ex. 4, Ref. (b)) This was about 9 months *after* the Petitioner filed his application in BCNR which was dated July 8, 1952. If, on the other hand, the power to issue the directive was founded upon Regulation 32 CFR § 723.6 (2), such was dated November 11, 1952, which was about 4 months *after* Petitioner filed his Application with BCNR. In these and other circumstances, the Secretary of the Navy was powerless to seek "advisory opinions" in the instant case from any source. The decision of BCNR based upon them should not be permitted to stand.

The recitations at the bottom of page 10 of Respondent's brief are incorrect. Petitioner neither signed the exhibits referred to nor did he give the information quoted. The sources of both recitations are unknown to him.

Respondent's brief near the bottom of page 11 presents a small excerpt of the testimony of Dr. Fuchs. We are satisfied that it should be treated here.

Respondent states, "*admittedly*, [Dr. Fuchs] *could give no opinion* as to Petitioner's fitness for duty on October 17, 1946." (Italics supplied) Dr. Fuchs then states, *in part*, (Italics supplied) as follows: " • • • I have given no opinion as to whether he was in 1948 fit for military service", and Dr. Fuchs added the years, "Or 1945 or 1946". We vigorously disagree with the interpretation placed upon this language by the Respondent. The word "admittedly" is incorrect in the context used. More significantly, Respondent takes the position that the words, "could give no opinion" are synonymous with the words, "I have given no opinion • • •." We think not. Respondent neglects to recite *all* of the material part of Dr. Fuchs' answer, giving only part of it as above indicated. Here is the complete response made by Dr. Fuchs.

> "Dr. Fuchs: Well, I believe the question as originally put to me was, 'Is he now fit for military service?' I said No. The second question that was asked me by your President or one of the other Members, 'Would he be able to operate a plane in the period 1945-1949?' *He could if he were not having the headaches at that particular moment.* I have given no opinion as to whether • • • ".

Earlier, the testimony of Dr. Fuchs revealed that Petitioner had severe headaches at the rate of 3 to 10 a month. (Ex. 7, p. 16) Then the following testimony appeared: (Ex. 7, p. 17)

> Mr. DeWald: Would there be, in your opinion, during that course of time that he was on active duty from 1945 until September of 1946 and from November of 1948 up until July of 1950, it would be your opinion, that he should not have been flying during that period of time, based upon what you have observed in this case? This is a difficult position I am putting you in. I am asking you for an opinion during the time you never saw him.
>
> Dr. Fuchs: I should say that if he had headaches to this degree he should not have been flying.

Mr. DeWald: Any questions, Mr. Wilson?

Mr. Wilson: Would you say, if he had had headaches during that period to that degree he could not have flown an airplane?

Dr. Fuchs: For a patient they are not predictable. If he should be fortunate as to operate a plane during the period of time that he was not incapacitated he would have no difficulty in operating it. But should he be incapacitated he would be under serious difficulty to continue to pilot a plane.

Mr. Barnes: Doctor, I believe you said it was your understanding the headaches have been present right from the beginning of the time of trauma, right on through?

Dr. Fuchs: Yes.

Later, Mr. Barnes again revived this subject and stated: (Ex. 7, p. 64)

Well, I think we pretty much established something to back up Dr. Fuchs' impression that these headaches have been rather continuous ever since the time of the crash. I don't mean continuous. I mean there's been a regular pattern of headaches.

Respondent in the middle of page 11 of its brief states that, "X-ray would not be useful in revealing the injury to the brain." Respondent has confused "injury to the brain" with "scar tissues of the brain."

Mr. Pons: Do you know whether he has scar tissues of the brain?

Mr. DeWald: This is something that would be disclosed by X-rays?

Dr. Fuchs: No, or other specialized techniques we have.

It seems astonishing that a substantial part of the Hearing was devoted to Petitioner's fractured skull and the serious consequences resulting from this injury, yet the BCNR refers to the fracture only as, "or headaches." It didn't

bother to tell us what caused them. As to the headaches, BCNR found a regular pattern of them since the time of the airplane crash. This conclusion is in such serious conflict with the Pugh secret advisory opinion of November 6, 1953 (Ex. 6), as might lead one to conclude that these authorities were talking about two different patients. Either Petitioner was incapacitated or, if not, that Naval Medical staffs must, as prophets, tell him in advance that he is going to have a serious headache, so don't fly a plane today, but you may fly one tomorrow. If Naval Medical Staffs could have shown that he was pilot of a plane *with a cadet in it*, on a training flight at any time after the airplane crash, we are satisfied they would have done so. (Italics supplied)

Respondent's brief pp. 12-13 states that the petitioner "does not allege that this practice was not authorized by the departmental regulations establishing the Board," the reference to practice being the fact that BCNR considered "An opinion of the Naval Retiring Review Board and two letters from the Bureau of Medicine and Surgery," such two letters being the secret Advisory Opinions of Dr. Pugh and Dr. Reitz. Respondent then quotes a regulation of Title 32 CFR § 723.6(2). Clearly, Petitioner was under no duty to show that departmental regulations did not authorize the use of evidence in the form and manner in which it was presented herein. Such a burden had to be undertaken by Respondent. If, however, the Regulation permits the use of the evidence as presented to the BCNR, it would not only be contrary to the statute here under which it was promulgated, but would break new ground in proof of issues in any tribunal. It is not without significance that Respondent did not rely upon this or any other Regulation in the Court below. Petitioner below in his brief in support of his Motion for Rehearing, contrary to Respondent's footnote 8 on page 12 of its brief, did state that, "Plaintiff could not have had a fair and impartial hearing." Regulation 723.6(2) contains no pro-

vision which would remotely support the ugly practice adopted by BCNR in the instant case.

Petitioner invites the attention of the Court to the *Authority* for Sections 723.1 to 723.11 as issued under Section 207, 60 Stat. 837, as amended; 5 U.S.C. 191(a). The *Source* of Sections 723.1 to 723.11 appears at 17 F.R. 10243, *November 11, 1952.* (Italics supplied) Petitioner's application for correction of his naval record was filed with the Board for the Correction of Naval Records and it was dated July 8, 1952. The application was acknowledged as having been received by said Board on July 10, 1952. If the Regulation 723.6(2) allows or permits the practice about which Petitioner here complains, it would have no application to him, as it was promulgated *after* his application was filed in BCNR. (Italics supplied)

Respondent's position would not appear to be founded upon any apprehension as to these secret or non-secret advisory opinions being rendered by medical officers of the service for the use of BCNR. Further, Respondent appears contented with the thoroughness of the medical examinations given the Reserve Components of the services. However, the organization of Disabled American Veterans is in serious disagreement with Respondent as to these advisory opinions from military personnel and has consistently condemned the practice of the Boards seeking them and adopting them. The National Report of the DAV is printed pursuant to the authority of Public Law No. 249, 77th Congress, approved September 19, 1941. For the year 1956, 85 Congress, 1st Session, it became House Document No. 44. This Thirty-Sixth National Report stated: (p. 72)

> "All of the correction boards are still relying upon military doctors for advisory medical opinions. We have contended in the past, and it still is our contention, that complete justice cannot be dispensed in the face of such a practice. Congress stipulated that

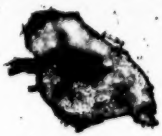
the correction boards would be composed of civilians. This stipulation has the sole purpose of removing the adjudication of cases involving error or injustice from under the jurisdiction of the military. Just so long as the correction boards have to rely upon the military for medical advice the intent of Congress will not be carried out in its fullest sense. *Since World War II the Armed Forces have been empowered to employ civilian medical consultants. There is no reason why such a practice cannot be adopted by the Department of Defense, upon whom all of the correction boards could draw for the medical advice they admittedly need.*" (Italics supplied)

It is shown in this Report (p. 73) that for the year 1956 DAV appeared in 101 Hearings before various Correction Boards for the 4 services. Clearly, this number constituted a relatively small number of such cases which went before these Correction Boards.

CONCLUSION

Respondent's opposition fails to provide any defense of the proceedings below upon the more substantial questions presented here. These, as we have urged, break new ground in a wide area affecting countless disabled Veterans of World War II. However, the *Proper* case, Supra (Pet. 16) was by a divided Court of three Judges to two Judges. Judge Littleton, who retired on November 1st, 1958, wrote the majority opinion. His vacancy has not been filled.

It is respectfully submitted that this petition for a writ of certiorari should be granted.



Respectfully submitted,

REES B. GILLESPIE,
Shoreham Building,
15th and H Streets, N. W.,
Washington 5, D. C.

Attorney for Petitioner